CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 31 JANUARY 15, 1997 NO. 3

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 96–1)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR DECEMBER 1996

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: December 25, 1996.

Greece drachma:

December 1, 1996	$0.004134
December 2, 1996	.004122
December 3, 1996	.004078
December 4, 1996	.004071
December 5, 1996	.004091
December 6, 1996	.004097
December 7, 1996	.004097
December 8, 1996	.004097
December 9, 1996	.004077
December 10, 1996	.004080
December 11, 1996	.004101
December 12, 1996	.004103
December 13, 1996	.004088
December 14, 1996	.004088
December 15, 1996	.004088
December 16, 1996	.004080
December 17, 1996	.004086
December 18, 1996	.004058
December 19, 1996	.004049
December 20, 1996	.004049
December 21, 1996	.004049
December 22, 1996	.004049
December 23, 1996	.004038
December 24, 1996	.004040
December 25, 1996	.004040
December 26, 1996	.004036
December 27, 1996	.004039
December 28, 1996	.004039
December 29, 1996	.004039
December 30, 1996	.004040
December 31, 1996	.004049

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for December 1996 (continued):

South Korea won:

December 1, 1996	$0.001206
December 2, 1996	.001202
December 3, 1996	.001200
December 4, 1996	.001202
December 5, 1996	.001201
December 6, 1996	.001200
December 7, 1996	.001200
December 8, 1996	.001200
December 9, 1996	.001195
December 10, 1996	.001193
December 11, 1996	.001188
December 12, 1996	.001178
December 13, 1996	.001179
December 14, 1996	.001179
December 15, 1996	.001179
December 16, 1996	.001183
December 17, 1996	.001183
December 18, 1996	.001185
December 19, 1996	.001184
December 20, 1996	.001183
December 21, 1996	.001183
December 22, 1996	.001183
December 23, 1996	.001183
December 24, 1996	.001181
December 25, 1996	.001181
December 26, 1996	.001181
December 27, 1996	.001181
December 28, 1996	.001181
December 29, 1996	.001181
December 30, 1996	.001181
December 31, 1996	.001180

Taiwan N.T. dollar:

December 1, 1996	$0.036377
December 2, 1996	.036364
December 3, 1996	.036350
December 4, 1996	.036337
December 5, 1996	.036337
December 6, 1996	.036337
December 7, 1996	.036337
December 8, 1996	.036337
December 9, 1996	.036337
December 10, 1996	.036337
December 11, 1996	.036337
December 12, 1996	.036337
December 13, 1996	.036337
December 14, 1996	.036337
December 15, 1996	.036337
December 16, 1996	.036337
December 17, 1996	.036337
December 18, 1996	.036350
December 19, 1996	.036350
December 20, 1996	.036350
December 21, 1996	.036350
December 22, 1996	.036350
December 23, 1996	.036364

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for December 1996 (continued):

Taiwan N.T. dollar (continued):

December 24, 1996	$0.036337
December 25, 1996	.036337
December 26, 1996	.036337
December 27, 1996	.036337
December 28, 1996	.036337
December 29, 1996	.036337
December 30, 1996	.036337
December 31, 1996	.036337

Dated: January 2, 1997.

FRANK CANTONE,
Chief,
Customs Information Exchange.

(T.D. 97–2)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR DECEMBER 1996

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 96–72 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: December 25, 1996.

Ireland pound:

December 1, 1996	$1.682000
December 2, 1996	1.681500
December 31, 1996	1.692000

Mexico peso:

December 6, 1996	$0.126263
December 7, 1996	.126263
December 8, 1996	.126263
December 12, 1996	.126374
December 13, 1996	.126263
December 14, 1996	.126263
December 15, 1996	.126263

FOREIGN CURRENCIES—Variances from quarterly rates for December 1996 (continued):

Switzerland franc:

December 3, 1996	$0.752729
December 4, 1996	.755858
December 9, 1996	.753693
December 10, 1996	.753296
December 16, 1996	.753580
December 17, 1996	.757002
December 18, 1996	.750638
December 19, 1996	.747943
December 20, 1996	.750469
December 21, 1996	.750469
December 22, 1996	.750469
December 23, 1996	.747664
December 24, 1996	.743494
December 25, 1996	.743494
December 26, 1996	.743329
December 27, 1996	.740576
December 28, 1996	.740576
December 29, 1996	.740576
December 30, 1996	.739919
December 31, 1996	.746826

United Kingdom pound:

December 1, 1996	$1.682000
December 2, 1996	1.684000
December 9, 1996	1.647500
December 10, 1996	1.650500
December 11, 1996	1.658000
December 12, 1996	1.657000
December 13, 1996	1.660300
December 14, 1996	1.660300
December 15, 1996	1.660300
December 16, 1996	1.662200
December 17, 1996	1.672000
December 18, 1996	1.672200
December 19, 1996	1.652500
December 20, 1996	1.667000
December 21, 1996	1.667000
December 22, 1996	1.667000
December 23, 1996	1.671500
December 24, 1996	1.671500
December 25, 1996	1.671500
December 26, 1996	1.672600
December 27, 1996	1.691700
December 28, 1996	1.691700
December 29, 1996	1.691700
December 30, 1996	1.690800
December 31, 1996	1.712300

Dated: January 2, 1997.

FRANK CANTONE,
Chief,
Customs Information Exchange.

(T.D. 97–3)

FOREIGN CURRENCIES

QUARTERLY RATES OF EXCHANGE: JANUARY 1 THROUGH MARCH 31, 1997

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Country	Name of currency	U.S. dollars
Australia	Dollar	$0.789500
Austria	Schilling	0.092251
Belgium	Franc	0.031486
Brazil	Cruzado	0.962094
Canada	Dollar	0.728014
China, P.R.	Renminbi yuan	0.120073
Denmark	Krone	0.169722
Finland	Markka	0.216779
France	Franc	0.192560
Germany	Deutsche mark	0.648803
Hong Kong	Dollar	0.129299
India	Rupee	0.027778
Iran	Rial	N/A
Ireland	Pound	1.667500
Israel	Shekel	N/A
Italy	Lira	0.000660
Japan	Yen	0.008659
Malaysia	Dollar	0.396118
Mexico	Peso	0.126502
Netherlands	Guilder	0.578035
New Zealand	Dollar	0.707200
Norway	Krone	0.156715
Philippines	Peso	N/A
Portugal	Escudo	0.006447
Singapore	Dollar	0.714796
South Africa, Republic of	Rand	0.213106
Spain	Peseta	0.007699
Sri Lanka	Rupee	0.017630
Sweden	Krona	0.145457
Switzerland	Franc	0.744602
Thailand	Baht (tical)	0.039032
United Kingdom	Pound	1.687000
Venezuela	Bolivar	0.002098

Dated: January 2, 1997.

FRANK CANTONE,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, December 31, 1996.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

JOHN DURANT,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF WOMEN'S REVERSIBLE GARMENT

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking ruling PD 818415, dated February 2, 1996, concerning the tariff classification of a women's reversible garment. Notice of the proposed revocation was published on November 20, 1996, in the CUSTOMS BULLETIN, Volume 30, No. 47.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after March 17, 1997.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Hollaway, Tariff Classification Appeals Division (202) 482–6996.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On November 20, 1996, Customs published in the CUSTOMS BULLETIN, Volume 30, No. 47, a notice of a proposal to revoke PD 818415, dated

February 2, 1996, which classified a women's jacket under the tariff provision providing for men's or boys' anoraks (including ski-jackets), windbreakers, or similar garments under subheading 6201.93.3511 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). No comments were received in response to the notice.

It is now Customs position that the garment is classifiable as a women's anorak (including ski-jackets), windbreakers or similar garments under subheading 6202.93.4500, HTSUSA, or subheading 6202.93.5011, HTSUSA, depending on whether it is water resistant. Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs revokes PD 818415, dated February 2, 1996. Headquarters Ruling Letter 959129 revoking PD 818415 is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), of the Customs Regulations (19 CFR 177.10(c)(1)).

Dated: December 30, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, December 30, 1996.

CLA–2 RR:TC:TE 959129 RH
Category: Classification
Tariff No. 6202.93.4500

MR. JOHNNY LEE
BJ CUSTOMS BROKERAGE CO., INC.
P.O. Box 91034
Los Angeles, CA 90009–1034

Re: Revocation of District Decision PD 818415; classification of a reversible jacket; men's or women's; Note 8, Chapter 62; Subheading 6202.93.

DEAR MR. LEE:

On February 2, 1996, Customs issued ruling letter PD 818415 (copy enclosed) regarding the classification of a reversible jacket, which you client, Marshall Gobuty International, Inc., intended to import from China. In that ruling, the jacket was classified as a men's or boys' anorak (including ski-jackets), windbreakers or similar article under subheading 6201.93.3000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). If the garment passed the water resistance test of Additional U.S. Note 2 to Chapter 62, it was classified under subheading f6201.93.3511, HTSUSA. At the request of our New York of-

fice, we reviewed PD 818415 and determined that the jacket should have been classified as a women's or girls' garment. This ruling, therefore, revokes PD 818415 and classifies the garment under either subheading 6202.93.4500 or subheading 6202.93.5011, depending on whether it is water resistant.

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed revocation of PD 818415 was published on November 20, 1996, in the CUSTOMS BULLETIN, Volume 30, No. 47.

Facts:

The merchandise in question is a reversible jacket, style number 1763. One side is made of 100 percent cotton woven denim and the other side is 100 percent nylon woven fabric which has been coated with polyurethane. The jacket has a denim collar, a full frontal opening with a six-button closure, long sleeves with buttoned cuffs and a waistband with adjustable, buttoned tabs on each side. The denim side features double needle stitching along the seams, two chest pockets with buttoned flaps, two slash pockets at the waist and an embroidered logo ("The Original ARIZONA Jeans Company") in the middle of the back panel. The nylon side is quilted and has two slash pockets at the waist. The collar is constructed of cotton denim fabric. The left chest features a smaller version of the embroidered logo.

Issue:

Is the jacket classifiable as a men's or women's anorak (including ski-jackets), windbreaker or similar garment in Chapter 62?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in their appropriate order. Heading 6201 provides for men's or boys' overcoats, carcoats capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles. Heading 6202 provides for the same articles for women or girls.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN), while not legally binding, are recognized as the official interpretation of the Harmonized System at the international level. Note 8 to Chapter 62, pertains to classification of garments by gender. It states:

> Garments of this chapter designed for left over right closure at the front shall be regarded as men's or boys' garments, and those designed for right over left closure at the front as women's or girls' garments. These provisions do not apply where the cut of the garment clearly indicates that it is designed for one or other of the sexes.
>
> Garments which cannot be identified as either men's or boys' garments or as women's or girls' garments are to be classified in the headings covering women's or girls' garments.

In this case, the nylon side of the reversible jacket is designed for right over left closure, which would make it a women's or girls' garment. On the other hand, the cotton denim side closes left over right, which indicates it is a men's or boys' garment. Both sides of the jacket are fashionable and suitable for wear on the outside. In this case, it is the personal preference of the wearer that will determine which side of the garment is worn on the outside and, thus, which way it closes. Moreover, the cut and style of the garment does not clearly indicate that it is designed for a certain gender; this particular garment is commonly worn by both sexes. Since, the gender of the garment cannot be identified, it will be classified in heading 6202 which covers women's or girls' anoraks (including ski-jackets) windbreakers and similar articles, in accordance with Note 8, Chapter 62.

Next, we refer to the subheadings of heading 6202, which classify garments according to their fabric construction. Subheading 6202.92 provides for anoraks (including ski-jackets), windbreakers and similar articles of cotton, and subheading 6202.93 which provides for such garments of man-made fibers (i.e., nylon). Since there are two competing subheadings, the garment cannot be classified solely on the basis on GRI 1. Therefore, we must refer to the remaining GRIs, in their appropriate order.

GRI 2(a) is not applicable in this case as it refers to incomplete or unfinished articles. GRI 2(b) directs that the classification of goods consisting of more than one material (i.e., cotton and nylon fabrics in this case) shall be according to the principles of rule 3. That rule

applies to goods that are *prima facie* classifiable under two or more headings or subheadings (6202.92 and 6202.93 in this case).

GRI 3(a) states that where two or more headings each refer to part only of an article, classification is determined using a GRI 3(b) analysis. In this case, subheading 6202.92 refers only to the cotton denim side of the garment and subheading 6202.93 refers only to the nylon side. Thus, GRI 3(b) is applicable. It states that the material or component which imparts the essential character to an article will determine classification. In this case, both sides of the reversible garment are equally suitable for wear as the outer shell, as discussed above. Neither the cotton side nor nylon side imparts the essential character to the garment.

As none of the constituent materials impart the essential character to the garment, Customs must look to the next applicable GRI for classification of the article. GRI 3(c) provides that when goods cannot be classified by reference to GRI 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration. Between the competing subheadings in this case, 6202.92 and 6202.93, it is the latter which controls classification.

Holding:

Provided the reversible jacket, style 1763, satisfies the requirements for water resistance in accordance with Additional U.S. Note 2, Chapter 62, HTSUSA, the applicable subheading 6202.93.4500, which provides for "Women's or girls' overcoats, carcoats, capes, cloaks, anoraks (including ski-jackets), windbreakers and similar articles (including padded, sleeveless jackets), other than those of heading 6204: Of man-made fibers: Other: Other: Other: Water resistant. They are dutiable at the general rate of 7.5 percent *ad valorem*. If they do not satisfy the requirements for water resistance, they are classified under subheading 6202.93.5011, dutiable at the general rate of 29.1 percent *ad valorem*. In either case, the textile category is 635.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 96–195)

HOSIDEN CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 91–10–00720

(Dated December 19, 1996)

ORDER

GOLDBERG, *Judge:* On October 28, 1996, a Stipulation of Dismissal regarding this consolidated case was filed with this Court. A number of parties to the case did not sign the stipulation. Accordingly, on October 30, 1996, the Court ordered that any parties opposing dismissal of the case file papers with the Court no later than December 9, 1996, showing cause why the case should not be dismissed. No parties have responded to the Court's order of October 30. It is hereby,

ORDERED that Consolidated Case No. 91–10–00720 is dismissed.

(Slip Op. 96–196)

RHEEM METALURGICA S/A, FORMERLY RHEEM EMPREENDIMENTOS INDUSTRIAIS E COMERCIAIS S.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–06–00380

Plaintiff challenges the United States Customs Service's denial of its protests concerning nine entries of cold rolled carbon steel sheet from Brazil. In moving for summary judgment, plaintiff asserts the entries became liquidated by operation of law following the passage of four years from their dates of entry into the United States. Plaintiff also contends it did not assert countervailing duties were due on the goods when they entered the United States, and therefore the Customs Service improperly assessed and collected countervailing duties after the entries became liquidated by operation of law. Defendant cross-moves for summary judgment, claiming the entries were not eligible to become liquidated

by operation of law. In the alternative, defendant cross-moves for summary judgment arguing that if the entries became liquidated by operation of law, they became liquidated by operation of law at a higher rate than was assessed when the Customs Service liquidated the entries. Defendant asserts two counterclaims, consistent with its alternative characterizations of this case, claiming additional countervailing duties are due on the entries in question.

Held: Plaintiff's challenge is rejected and its motion for summary judgment is denied. Defendant's cross-motion for summary judgment asserting the entries were not eligible to be liquidated by operation of law and the accompanying counterclaim are denied. Defendant's cross-motion for summary judgment asserting the entries became liquidated by operation of law and the corresponding counterclaim for additional countervailing duties are granted in part and denied in part.

(Dated December 20, 1996)

David P. Schulingkamp, New Orleans, LA, for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(James A. Curley); Edward N. Maurer,* Office of the Assistant Chief Counsel, United States Customs Service, of Counsel, for defendant.

OPINION

CARMAN, *Chief Judge:* This case is before the Court on cross-motions for summary judgment pursuant to USCIT R. 56. Plaintiff challenges the United States Customs Service's ("Customs") denial of its protests concerning the assessment and collection of countervailing duties on nine entries of cold rolled carbon steel sheet from Brazil. Plaintiff moves for summary judgment, contending the entries became liquidated by operation of law on the dates of their fourth anniversary of entering into the United States. Plaintiff asserts the goods became liquidated by operation of law at the value, quantity, rate of duty and amount of duty asserted by plaintiff at the time of entry, and claims that because plaintiff did not assert countervailing duties were due in the entry summary documentation accompanying the nine entries, Customs improperly assessed and collected countervailing duties when the goods ultimately were liquidated.

Defendant cross-moves for summary judgment, contending the nine entries never were eligible to become liquidated by operation of law due to confusion over the status of the entries, and asserts a counterclaim with respect to certain entries, which it contends should have been liquidated at a higher countervailing duty rate. Alternatively, defendant asserts if the nine entries did become liquidated by operation of law, they became liquidated by operation of law at a higher rate than was assessed when Customs liquidated the goods in 1989. Defendant asserts a second counterclaim, contingent upon this Court's finding the entries at issue became liquidated by operation of law, for additional countervailing duties it claims are due upon the merchandise at issue. The cross-movants agree, and the Court finds, there are no genuine material issues of fact in dispute and this action may be decided on motion for summary judgment under USCIT R. 56. This Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988), and for the reasons set forth below denies plain-

tiff's motion for summary judgment and defendant's counterclaims, and grants in part and denies in part defendant's cross-motion for summary judgment.

BACKGROUND

At issue in this case are nine entries of cold rolled carbon steel sheet which plaintiff exported from Brazil—where the merchandise was manufactured—and imported into the United States. Plaintiff is not a manufacturer of cold rolled carbon steel sheet. Rather, Rheem purchased the goods from three Brazilian manufacturers: Companhia Siderurgica Paulista ("COSIPA"), Companhia Siderurgica Nacional ("CSN") and Usinas Siderurgicas de Minas Gerais ("USIMINAS"). The goods entered the United States at the ports of Houston and New Orleans between February 16, 1984 and June 15, 1984. The following chart lists the entries, as well as their dates of entry and liquidation.[1]

Entry Number	*Date of Entry*	*Date of Liquidation*
84–343083–7	2/16/84	11/24/89
84–343092–1	3/20/84	11/13/89
84–343093–4	3/26/84	11/17/89
84–344297–7	4/02/84	11/13/89
84–343097–6	4/22/84	11/17/89
84–344910–3	5/02/84	09/15/89
84–345314–4	6/15/84	11/24/89
558–84231317–5	5/08/84	7/28/89
558–84232292–0	5/30/84	7/28/89

On February 10, 1984, several days before the first of the nine entries at issue was imported into the United States, the Department of Commerce ("Commerce") published its preliminary determination in countervailing duty investigation C–351–021, the scope of which included cold rolled carbon steel sheet from Brazil. *See Certain Carbon Steel Products from Brazil*, 49 Fed. Reg. 5,157 (Dep't Comm. 1984) (prelim. determ.). Commerce's preliminary determination found that Brazilian manufacturers, producers, or exporters of certain carbon steel products were receiving subsidies, and estimated the net subsidy to be 27.42% *ad valorem*. The preliminary determination directed the Customs Service to suspend liquidation of all entries of subject merchandise from Brazil and to require a cash deposit or bond on the subject merchandise equal to the estimated net subsidy.

Plaintiff imported the nine entries claiming they were classifiable under item 607.8360, TSUS, a tariff provision within the scope of Commerce's *Certain Carbon Steel Products from Brazil* countervailing duty

[1] The chart's first seven entries passed through the port of Houston, while the last two entries passed through the port of New Orleans.

investigation. In fulfilling the requirements for entering the goods into the United States, plaintiff completed a Customs Form 7501 ("CF 7501") and a Special Steel Summary Invoice ("SSSI") for each entry. Plaintiff or its agent acknowledged the entered goods were within the scope of Commerce's investigation by writing or typing "CVD" or "C–351–021" or both on the CF 7501 forms or the corresponding invoices accompanying the entries. Customs rejected the entry summary documentation of several entries, even though plaintiff acknowledged the applicability of Commerce's investigation to its entries, due to plaintiff's failure to post an appropriate bond as required by the preliminary determination. Once plaintiff posted a proper bond, the amount of which was calculated based on the appropriate countervailing duty rates published in the Federal Register, Customs accepted Rheem's entry summaries as filed in proper form. In addition to completing the CF 7501 forms, plaintiff completed SSSIs as part of the requirements for getting its goods entered into the United States. Despite the fact that plaintiff did not manufacture cold rolled carbon steel sheet, several of the SSSIs incorrectly stated that Rheem was the manufacturer of the entered merchandise.

Commerce's final determination in the countervailing duty investigation was published in the Federal Register on April 26, 1984. *See Certain Carbon Steel Products from Brazil*, 49 Fed. Reg. 17,988 (Dep't Comm. 1984) (final determ.). Commerce's final determination made an affirmative finding of subsidization and established the following countervailing duty rates for Brazilian manufacturers exporting subject merchandise to the United States: COSIPA 36.48% *ad valorem*; CSN 62.18% *ad valorem*; USIMINAS 17.49% *ad valorem*; All others 36.95% *ad valorem*.

The day after Commerce published its final determination, Customs issued Instruction 84/113 (Telex 04272). Instruction 84/113 provided guidance to Customs officials on how to apply and enforce the results of Commerce's determination, stating "[w]here the producer is no [sic] the exporter, and the producer is known, the rate for that producer shall be used in determining the cash deposit. If the producer is unknown, the rate shall be 36.95 percent ad valorem." United States Customs Service, Instruction 84/113 (Telex 04272) (April 27, 1984).

Slightly less than three years later, Commerce published the final results of its first administrative review, which covered the period from February 10, 1984 to September 30, 1984. Commerce's first administrative review established the following countervailing duty rates: COSIPA 9.14% *ad valorem*; CSN 39.98% *ad valorem*; USIMINAS 0.0% *ad valorem*; All Others 21.13% *ad valorem*. *See Certain Carbon Steel Products from Brazil*, 52 Fed. Reg. 829 (Dep't Comm. 1987) (first admin. review).

Commerce's findings in the first administrative review were challenged in this Court by COSIPA, CSN and an importer of the subject

merchandise.[2] On February 18, 1987, slightly more than one month after the results of the first administrative review were published in the Federal Register, this Court issued an injunction prohibiting Commerce and the Customs Service from liquidating any or all unliquidated entries of carbon steel sheet exported by COSIPA or CSN that were subject to the results of the first administrative review. On February 18, 1987, the Customs Service issued Instruction 87–81 (Telex 001999), which incorrectly instructed Customs officers to withhold liquidation of all entries covered by the first administrative review, rather than only the subject merchandise exported by COSIPA or CSN. This instruction was modified on July 23, 1987, following Commerce's request that the Customs Service issue a second telex clarifying the instructions communicated in Instruction 87–81. Instruction 87–199 (Telex 08432) stated

> 1. THIS CORRECTS C.I.E. INSTRUCTIONS NO. 87/81 OF FEBRUARY 18, 1987.
>
> * * * * * * *
>
> THE SUSPENSION OF LIQUIDATION INSTRUCTIONS IN THAT C.I.E. APPLY ONLY TO ENTRIES OF CERTAIN CARBON STEEL PRODUCTS EXPORTED BY COMPANHIA SIDERURGICA PAULISTA ("COSIPA") OR COMPANHIA SIDERURGICA NACIONAL ("CSN").
>
> * * * * * * *
>
> THE PRELIMINARY INJUNCTION ISSUED BY THE COURT OF INTERNATIONAL TRADE APPLIES ONLY TO ENTRIES OF THIS MERCHANDISE EXPORTED BY COSIPA OR CSN.

United States Customs Service, Instruction 87–199 (Telex 08432) (July 23, 1987).

Customs ultimately liquidated the nine entries between July 28, 1989 and November 24, 1989, more than four years after the date of entry for all nine entries. Customs classified the goods under item 607.83, TSUS, and assessed regular duties of 6.6% *ad valorem* in addition to countervailing duties. Customs assessed countervailing duties according to the exporter identified in the entry summary documentation, unless those papers identified the goods' manufacturer, in which case Customs assessed countervailing duties at the corresponding rate for that manufacturer. In liquidating the goods, Customs assessed and collected countervailing duties according to the rates published by Commerce in the first administrative review, *i.e.*, COSIPA 9.14% *ad valorem*; CSN 27.42% *ad valorem*;[3] USIMINAS 0.0% *ad valorem*; and All Others 21.13% *ad valorem*.

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[2] The importer ultimately abandoned its challenge of the first administrative review, while this Court rejected COSIPA and CSN's challenge. *See Companhia Siderurgica Paulista, S.A. v. United States*, 12 CIT 1098, 700 F. Supp. 38 (1988).

[3] While Commerce's final determination found a higher countervailing duty rate for CSN, the preliminary determination's bond-posting rate of 27.42% *ad valorem* established a ceiling on the rate to be assessed.

CONTENTIONS OF THE PARTIES

A. *Plaintiff:*

In its papers submitted to this Court, plaintiff advances two arguments in support of its motion for summary judgment. First, plaintiff argues the nine entries at issue became liquidated by operation of law on the fourth anniversary of their dates of entry into the United States. Plaintiff contends "[a]ll nine entries in question should be deemed by this Court to have been liquidated by operation of law under 19 U.S.C. 1504 on the fourth anniversary date of each of the entries, at the rate and amount of duty asserted at the time of entry." (Pl.'s Br. in Supp. of Mot. for J. on Agency R. (Pl.'s Br.) at 3.) Plaintiff asserts the entries were eligible for liquidation because Instruction 87–199, issued by Customs on July 23, 1987, clearly terminated the suspension of liquidation established in Commerce's preliminary determination, and that the District Directors failed to liquidate the entries within four years of the date of their entry contrary to the specific instructions of Instruction 87–199.[4] Plaintiff contends Customs' confusion over the scope of this Court's injunction, which suspended liquidation of subject merchandise exported by COSIPA and CSN, but which did not cover merchandise exported by Rheem, should not be considered sufficient to prevent liquidation of the nine entries by operation of law.

In advancing its argument the nine entries became liquidated by operation of law, plaintiff relies heavily on this Court's decision in *Nunn Bush Shoe Co. v. United States*, 16 CIT 45, 784 F. Supp. 892 (1992), asserting the present case is "[i]n all material respects * * * square on point with *Nunn-Bush*." (Pl's Br. at 9.) Plaintiff asserts that, like in *Nunn Bush Shoe Co.*, this Court should determine that "entries which turned four years old were liquidated by operation of law and any subsequent attempts by Commerce to liquidate these entries are invalid." (Pl.'s Br. at 9 (quoting *Nunn Bush Shoe Co.*, 16 CIT at 48, 784 F. Supp. at 895.).)

Second, plaintiff argues it did not assert countervailing duties were due in the entry summary documentation it submitted, and therefore Customs improperly assessed and collected countervailing duties on the entries when the goods ultimately were liquidated. Plaintiff asserts the entries should be considered liquidated by operation of law "at the rate and amount of duty asserted by Rheem at the time of entry. The rate of duty asserted by Rheem and accepted by Customs, as evidenced by the entry documents presented by defendant, was 6.6% ad valorem." (Pl.'s Reply to Def.'s Opp'n to Pl.'s Mot. for Summ. J. (Pl.'s Reply) at 4 (emphasis omitted).) Plaintiff contends the entries at issue "were made with assertions of duties which did not include countervailing duties assessed by Customs subsequent to the time of entry and subsequent to the fourth anniversary date." (Pl's Br. at 9.) Plaintiff claims the assess-

[4] Plaintiff characterizes Customs' July 23, 1987 telex which states "CUSTOMS OFFICIALS WILL LIQUIDATE ALL SHIPMENTS OF THIS MERCHANDISE FROM OTHER EXPORTERS ENTERED, OR WITHDRAWN FROM WAREHOUSE, FOR CONSUMPTION ON OR AFTER FEBRUARY 10, 1984 AND ON OR BEFORE SEPTEMBER 30, 1984" as an order to liquidate. (Pl.'s Br. at 5.)

ment of countervailing duties by Customs constitutes an "untimely and unlawful liquidation [of] * * * increased duties that Customs had no authority to assess against these entries." (Pl.'s Reply at 4 (emphasis omitted).)

Plaintiff requests this Court order the District Directors of Customs at the ports of New Orleans and Houston to reliquidate the subject entries without the assessment of countervailing duties. Additionally, plaintiff seeks a refund of all countervailing duties paid on the nine entries, as well as interest on those payments. Finally, plaintiff requests this Court order defendant to pay plaintiff's costs incurred in bringing this suit, as well as attorney's fees and any other relief the Court deems just.

B. *Defendant*:

Defendant raises two arguments in support of its cross-motion for summary judgment and in response to plaintiff's assertions. First, defendant argues there was "legitimate confusion over the application of the liquidation instructions, resulting in an (erroneous) interpretation by the districts involved, that these entries were still subject to the suspension which remained in effect until the *COSIPA* case was resolved, which was after the entries were more than four years old." (Def.'s Opp'n to Pl.'s Mot. for J. on Agency R. and in Supp. of Def.'s Cross-Mot. for Summ. J. (Def.'s Br.) at 8.) Defendant asserts that "[a]s a result of this confusion, the entries should be viewed as falling under the rule in *Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563 (Fed. Cir. 1989), which is to the effect that where a suspension is removed after an entry is already more than four years old, the entry does not become deemed liquidated." (*Id.*) Pursuant to 28 U.S.C. § 1583 (1988), defendant asserts a counterclaim relying on this argument, asserting Customs improperly liquidated some of the subject merchandise at a rate of 9.14% *ad valorem*. Defendant contends that the appropriate rate is the "All Other" rate of 21.13% *ad valorem* for merchandise exported by any exporter other than COSIPA, CSN or USIMINAS which was established in the first administrative review. Defendant asserts that because Rheem was the exporter of record, all the entries should have been liquidated at the "All Other" rate of 21.13% *ad valorem*, and therefore, Rheem is liable for the difference, with interest as provided by law.

Alternatively, defendant argues "if the entries became deemed liquidated, it was at the net subsidy rate in effect on the date of entry regardless of whether Rheem posted a bond or deposited cash." (*Id.*) Contingent on this Court's finding the subject merchandise was liquidated by operation of law following the fourth anniversary of the merchandise's entry into the United States, defendant asserts a counterclaim, pursuant to 28 U.S.C. § 1583 (1988), claiming the entries should have been liquidated at the preliminary deposit rate of 27.42% *ad valorem*, or alternatively at the 21.13% *ad valorem* rate established by the first administrative review. Defendant contends plaintiff is liable for the difference between the amount actually assessed and collected upon

liquidation and 27.42% *ad valorem* or alternatively 21.13% *ad valorem*, with interest as provided by law.

STANDARD OF REVIEW

In any civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930, this Court reviews the record *de novo*. *See Semperit Indus. Prods., Inc. v. United States*, 855 F. Supp. 1292, 1297–98 (CIT 1994). Although the decision of the Customs Service is presumed correct and the "burden of proving otherwise shall rest upon the party challenging such decision," the Court's role in reviewing the decision is to reach the correct result. 28 U.S.C. § 2639(a)(1) (1988); *see also Semperit Indus. Prods., Inc.*, 855 F. Supp. at 1297 (citing *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984) (footnote omitted)). The Court will therefore consider this matter *de novo* and review the record to reach the proper result.

DISCUSSION

This case is before the Court on cross-motions for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(d). "The Court will deny summary judgment if the parties present a dispute about a fact such that a reasonable trier of fact could return a verdict against the movant." *Ugg Int'l, Inc. v. United States*, 17 CIT 79, 83, 813 F.Supp. 848, 852 (1993) (quotation and citation omitted). When appropriate, summary judgment is a favored procedural device to "secure the just, speedy and inexpensive determination" of an action. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed.Cir.1987) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986)) (internal quotations omitted). This case does not raise any genuine issue of material fact. The issues that remain are whether the nine entries became liquidated by operation of law, and what the appropriate countervailing duty rate was for liquidation. Because these issues pertain solely to matters of statutory interpretation, the Court concludes the conflict between the parties raises a question of law which the Court may properly resolve by summary judgment.

I. *Liquidation by Operation of Law:*

The first issue before this Court is whether the nine entries at issue became liquidated by operation of law. Merchandise not liquidated within one year of its entry into the United States—and not subject to the exceptions enumerated in 19 U.S.C. § 1504(b)—is liquidated by operation of law on the first anniversary of the date of entry at the value, quantity, rate of duty, and amount of duty asserted by the importer or its agent at the time of entry. *See* 19 U.S.C. § 1504(a)(1) (1988). The statute, however, includes several exceptions which permit Customs to extend liquidation beyond the first anniversary of the goods entering the

United States. *See* 19 U.S.C. § 1504(b) (1988). For example, the statute permits an extension when liquidation is suspended by operation of statute or court order. *See* 19 U.S.C. § 1504(b)(2) (1988). The statute, however, also includes a provision which, in relevant part, states

> Any entry of merchandise not liquidated at the expiration of four years **from the** applicable date specified in subsection (a) of this section, **shall be deemed** liquidated at the rate of duty, value, quantity, and **amount of duty asser**ted at the time of entry by the importer of record, ***unless liquidation*** *continues to be suspended as required by statute or court order.*

19 U.S.C. § 1504(d) (1988) (emphasis added).

This Court's decisions interpreting § 1504(d) reveal Customs has significant discretion in liquidating goods falling within § 1504(d)'s two exceptions. *See, e.g., Dal-Tile Corp. v. United States*, 17 CIT 764, 829 F. Supp. 394 (1993) (holding § 1504(a)'s one-year limit does not apply to entries falling within § 1504(d)'s exceptions, and Customs' liquidation eighteen months after date CIT dissolved final suspension of liquidation was within time allowed by § 1504(d)); *Eagle Cement Corp. v. United States*, 17 CIT 624 (1993) (holding entries more than four years old when court-ordered suspension of liquidation was terminated are not deemed liquidated by operation of law and sustaining Customs' liquidation twenty-one months after termination of the suspension of liquidation); *American Permac, Inc. v. United States*, 16 CIT 672, 679, 800 F. Supp. 952, 958 (1992) (citation omitted) ("It is clear that in enacting § 1504 Congress was dissatisfied with Treasury's delays in assessing antidumping and countervailing duties. Nevertheless, Plaintiff is incorrect that Congress intended the 4-year limit on liquidation under § 1504(d) to be the outside limit on all antidumping duty assessments."). Indeed, the breadth of Customs' discretion encouraged this Court to invite Congress to consider amending § 1504(d) in order to "promote certainty in the customs process while also providing Customs sufficient latitude for handling large numbers of entries." *Dal-Tile Corp.*, 17 CIT at 772, 829 F. Supp. at 400.

While this Court's decisions make clear Customs has significant discretion in liquidating entries falling within the exceptions listed in § 1504(d), the case law also clearly establishes §1504(d) will be applied strictly with regard to entries not falling within the exceptions. *See, e.g., Dal-Tile Corp.*, 17 CIT at 771, 829 F. Supp. at 399 (citation omitted) ("Under present law, if the suspensions were to terminate one day before the fourth anniversary date, Customs would have only one day in which to liquidate the merchandise and thereby avoid the application of the deemed liquidation rule in § 1504(d)."); *Nunn Bush Shoe Co.*, 16 CIT at 48, 784 F. Supp. at 894–95 ("Section 1504 unambiguously states that if an entry is not liquidated within four years, then it will be deemed liquidated by operation of law unless the period is extended as per 19 U.S.C. § 1504(b)(1)–(3).").

In determining whether the entries in the present case became liquidated by operation of law, the Court must examine whether the goods came within the scope of the exceptions listed in § 1504(d). In conducting this analysis, the Court must determine whether liquidation was suspended by operation of statute or by court order on the fourth anniversary of the goods entering the United States. First, with respect to statutory suspension of liquidation, the Court notes Commerce's publication on January 9, 1987 of its findings in the first administrative review terminated the statutory suspension of liquidation. *See* 19 U.S.C. § 1675(a)(1) (1988) (results of administrative review become basis for assessment of countervailing duties on entries covered by the review); 19 C.F.R. § 355.21(a) (1989) (Commerce will publish final countervailing duty order in Federal Register that "[i]nstructs the Customs Service to assess countervailing duties on the merchandise, in accordance with the Secretary's instructions at the completion of each administrative review"); *cf.* 19 U.S.C. § 1671b(d)(1) (1988) (requiring suspension of liquidation after a preliminary determination of subsidization is published in Federal Register); 19 U.S.C. § 1671e(a)(4) (1988) (requiring deposit of estimated countervailing duties pending liquidation of entries of merchandise). Because Commerce's publication of the results of the first administrative review in January 1987 terminated the statutory suspension of liquidation prior to the fourth anniversary of the goods entering the United States, the Court finds the entries in question did not fall within the exception of § 1504(d), which provides that merchandise not liquidated by the fourth anniversary of its entry into the United States "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record, *unless liquidation continues to be suspended as required by statute.*" 19 U.S.C. § 1504(d) (1988) (emphasis added).

In addition to addressing suspension of liquidation by operation of statute, § 1504(d) permits Customs to extend liquidation beyond the fourth anniversary of an entry's importation into the United States when a court order suspends liquidation of those goods. With respect to the present case, this Court's order of February 18, 1987 granting plaintiff's motion for a preliminary injunction in the *COSIPA* litigation applied only to products "exported by Companhia Siderurgica Paulista S.A. ('COSIPA') or by Companhia Siderurgica Nacional ('CSN')." *Companhia Siderurgica Paulista S.A. v. United States*, Court No. 87–02–00159 (CIT Feb. 18, 1987) (order granting preliminary injunction). Additionally, the Court notes defendant concedes Customs misunderstood the scope of this Court's injunction as it related to the liquidation instructions. *See* Def.'s Br. at 8 ("[T]here was legitimate confusion over the application of the liquidation instructions, resulting in an (erroneous) interpretation by the districts involved, that these entries were still subject to the suspension which remained in effect until the *COSIPA* case was resolved, which was after the entries were more than four years old."). The Court notes Customs' instructions regarding

liquidation of goods within the scope of the *Certain Carbon Steel Products from Brazil* countervailing duty investigation differentiate between exporters and manufacturers, suggesting Customs was comfortable with such a distinction, and that making this distinction was not overly difficult.[5]

The Court finds the injunction issued by this Court in the *COSIPA* case was not applicable to the nine entries at issue, which were both exported from Brazil and imported into the United States by Rheem. Customs' mistake as to the preliminary injunction's scope does not excuse its failure to liquidate the entries. The Court also finds the entries at issue were eligible for liquidation following Commerce's publication of the results of the first administrative review, which occurred within the four year period following their entry into the United States. Accordingly, the Court finds liquidation of the nine entries was not suspended by operation of statute or court order on the fourth anniversary of their entry into the United States, and because Customs failed to exercise its power to liquidate the entries within four years of their dates of entry, the Court finds the entries were liquidated by operation of law, pursuant to 19 U.S.C. § 1504(d) (1988), on the respective dates of the fourth anniversary of their entry into the United States

Finally, this Court rejects Customs' argument that *Canadian Fur Trappers Corp. v. United States*, 12 CIT 612, 691 F. Supp. 364 (1988) is relevant to this proceeding. *Canadian Fur Trappers Corp.* addresses the question of whether language in § 1504(d) requires liquidation of goods, where liquidation is suspended for more than four years from their date of entry under § 1504(d), within 90 days of the lifting of the suspension.[6] *Canadian Fur Trappers Corp.* is distinguishable from the present case because the goods at issue in *Canadian Fur Trappers*, unlike the nine entries at issue in the present case, were not eligible for liquidation upon the fourth anniversary of their entry into the United States. Because the Court, as noted above, finds the nine entries at issue in this case were not subject to any statutory or court ordered suspension of liquidation on the fourth anniversary of their entry into the United States, *Canadian Fur Trappers* is not relevant to the case at hand and does not affect the Court's finding that the nine entries at issue became liquidated by operation of law on the fourth anniversary of their entry into the United States.

II. *Proper Countervailing Duty Rate for Liquidation:*

Once it has been determined the entries in question were liquidated by operation of law, the remaining issue confronting the Court is determining the rate at which those entries became liquidated by operation of

[5] The liquidation instructions issued by Customs on the day the final determination was published in the *Certain Carbon Steel Products from Brazil* investigation stated, "[w]here the producer is no [sic] the exporter, and the producer is known, the rate for that producer shall be used in determining the cash deposit. If the producer is unknown, the rate shall be 36.95 percent ad valorem." United States Customs Service, Instruction 84/113 (Telex 04272) (April 27, 1984). Thus, the instructions directed Customs officials to "look behind" the exporter to determine whether a countervailing duty rate for the manufacturer of the goods could be applied.

[6] The statutory language at issue in *Canadian Fur Trappers Corp.* states "When such a suspension of liquidation is removed, the entry shall be liquidated within 90 days therefrom." 19 U.S.C. § 1504(d) (1988).

law. The statute provides entries liquidated by operation of law "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record." 19 U.S.C. § 1504(d) (1988). The meaning of "asserted" in § 1504 was addressed in a Notice of Final Rulemaking issued by the Customs Service, which stated "'asserted' means that which is claimed and indicated by the importer, his consignee or agent on the entry summary or warehouse withdrawal." *Customs Regulations, Relating to the Entry of Merchandise, Liquidation of Entries, Warehousing Periods, and Marking of Bulk Containers of Alcoholic Beverages, Amended*, 44 Fed. Reg. 46, 794, 46,809 (Dep't Treasury 1979).

While the arguments raised in the plaintiff's brief are consistent with the Court's finding the entries in question were liquidated by operation of law, plaintiff raises two arguments challenging Customs' assessment and collection of countervailing duties on the nine entries. First, plaintiff argues Rheem paid normal duties upon the goods entry, and that "additional [countervailing] duties * * * assessed by Customs upon the untimely and unlawful liquidation were not asserted by Rheem or Customs." (Pl.'s Reply Br. at 4.) In making this argument, however, plaintiff concedes it "hand-wr[ote] a preliminary countervailing duty investigation number on the face of its C.F. 7501's and * * * post[ed] the countervailing duty bond required by Customs." (Pl.'s Reply Br. at 5.)

Importers filing entry papers with the Customs Service have an obligation to make accurate submissions. *See* 19 C.F.R. § 141.64 (1984) (entry and entry summary documents found to contain errors "shall not be considered to have been filed in proper form and shall be returned to the importer for correction"). Customs rejected the entry summary documents submitted by plaintiff for several of the nine entries at issue for failure to post an adequate security as required by 19 U.S.C. § 1671b(d)(2) (1988).[7] Customs later accepted the entry summaries when a sufficient bond was posted, and plaintiff ultimately posted appropriate bonds on all nine entries.

The Court rejects plaintiff's contention that "[n]either hand-writing a countervailing duty investigation case number or [sic] posting a bond is an 'assertion' of an amount by the importer." (Pl.'s Br. at 7.) Rather, the Court finds plaintiff's notation of the appropriate investigation number on the CF 7501 forms or the accompanying entry summary documentation, as well as plaintiff's posting bonds to cover countervailing duties, are actions sufficient to constitute an assertion of countervailing duties, and accordingly the plaintiff is liable for payment of countervailing duties on the entries in question. *See American Permac, Inc. v. United States*, 10 CIT 535, 544 n. 12, 642 F. Supp. 1187, 1195 n. 12 (1986) ("The amount of duties 'asserted at the time of entry by the importer', within the meaning of § 1504(a) and (d), is not what the importer *desires*

[7] Following the publication of an affirmative preliminary determination of subsidization, Commerce "shall order the posting of a cash deposit, bond, or other security, as it deems appropriate, for each entry of the merchandise concerned equal to the estimated amount of the net subsidy." 19 U.S.C. § 1671b(d)(2) (1988).

to assert upon entry, but what the importer is *required by Customs officers* to assert when filing the entry summary."); *cf. Detroit Zoological Soc. v. United States*, 10 CIT 133, 137 n.9, 630 F. Supp. 1350, 1355 n.9 (1986) ("[T]he rate of duty corresponding to the classification asserted 'at the time of entry' is that which is on the entry summary accepted by Customs and contains *not* what the importer, his consignee, or agent necessarily desires but rather what Customs insists upon as a condition precedent to release of the merchandise."). While the exact rate and amount of duties was not specified by Rheem on the entry summary documents, by listing the investigation number and posting appropriate bonds for countervailing duties, Rheem acknowledged its liability for countervailing duties payable at the rate ultimately determined to be appropriate by Commerce.

Plaintiff, in its second argument against Customs' assertion and collection of countervailing duties on the nine entries in question, asserts Customs unlawfully assessed "increased" countervailing duties on the entries in question following their liquidation by operation of law. Plaintiff argues the entries became liquidated by operation of law at the rate asserted by plaintiff—which did not include countervailing duties—and therefore Customs' assessment and collection of countervailing duties constitutes an assessment of "increased" countervailing duties.

While the plaintiff is correct in stating Customs did collect countervailing duties on the entries after they had become liquidated by operation of law, plaintiff's description of Customs' action as collecting "increased" countervailing duties is inaccurate. Rather than collecting "increased" countervailing duties, Customs was collecting the countervailing duties it believed to be due on the entries following Commerce's publication of the first administrative review. Further discussion on this point, however, is unnecessary based on the Court's finding that the entries in question became liquidated by operation of law upon the dates of the fourth anniversary of their entry into the United States. Additionally, because the Court finds that the entry summary documents filed by plaintiff, as well as its posting bonds to cover countervailing duties, constitute an assertion of liability for countervailing duties under 19 U.S.C. § 1504(d), all that remains in disposing of this case is a brief discussion of the countervailing duty rates at which the entries became liquidated at by operation of law.

The statute clearly states that entries liquidated by operation of law are liquidated at "the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer." 19 U.S.C. § 1504(d) (1988). Between February 10, 1984 and April 25, 1984, importers of Brazilian carbon steel products within the scope of Commerce's countervailing duty investigation were required to post a bond or deposit cash equal to 27.42% of the merchandise's value in order to make entry. Consistent with Commerce's preliminary determination, the bonds posted by Rheem in the process of importing the first five entries at issue were

calculated at a rate of 27.42% *ad valorem*. Accordingly, the Court finds that the five entries which were imported to the United States after February 10, 1984 and before April 26, 1984 were liquidated by operation of law with countervailing duties due in the amount of 27.42% *ad valorem*.

As for the remaining four entries, which were imported into the United States on or after April 26, 1984 and before June 22, 1984, importers of carbon steel products from Brazil were required to post a bond or deposit cash equal to the countervailing duty rates published in Commerce's final determination in the *Certain Carbon Steel Products from Brazil* countervailing duty investigation. Those rates were 36.48% for COSIPA, 62.18% for CSN, 17.49% for USIMINAS, and 36.95% for all other manufacturers, producers, or exporters. Accordingly, the Court finds the merchandise manufactured by COSIPA, CSN or USIMINAS which entered the United States on or after April 26, 1984 and before June 22, 1984 was liquidated by operation of law with countervailing duties due in the amount of 36.48% *ad valorem*, 62.18% *ad valorem*, and 17.49% *ad valorem*, respectively. With respect to the merchandise which Rheem asserted it manufactured on the SSSI forms accompanying the entries, the Court is unclear whether Customs uniformly required plaintiff to post a bond at the rate of 62.18% *ad valorem* in order to enter that merchandise.[8] Therefore, the Court finds merchandise which plaintiff incorrectly stated was manufactured by Rheem on its SSSI forms was liquidated by operation of law at the rate which Customs required plaintiff to post a bond in order to enter that merchandise.

CONCLUSION

The nine entries at issue in this litigation, which were not subject to suspension of liquidation by operation of statute or court order, became liquidated by operation of law upon the fourth anniversary of their dates of entry into the United States.

Additionally, the entries at issue became liquidated by operation of law at the rate of duty, value, quantity, and amount of duty asserted by plaintiff on the entry summary documentation accompanying the merchandise. With respect to the five entries which were imported to the United States after February 10, 1984 and before April 26, 1984, the Court finds Rheem asserted countervailing duties at the rate established by Commerce's preliminary determination in the *Certain Carbon Steel Products from Brazil* investigation.[9] Accordingly, those entries became liquidated by operation of law with countervailing duties due in the amount of 27.42% *ad valorem*. As for the remaining four entries, which were imported into the United States on or after April 26, 1984

[8] The Court notes that with respect to the merchandise included in entry No. 558–84231317–5, in order to have its entry summary papers accepted as filed in proper form, plaintiff was required to post a bond for countervailing duties at the rate of 62.18% *ad valorem* on merchandise which the SSSI forms accompanying the goods incorrectly identified as manufactured by Rheem. *See* Def.'s Br. at 4–5.

[9] Commerce's preliminary determination in the *Certain Carbon Steel Products from Brazil* investigation, which established a countervailing duty rate of 27.42% *ad valorem*, was the only countervailing duty rate applicable to the first five entries *at their time of entry into the United States*. Before Customs accepted plaintiff's entry summary documentation as filed in proper form, plaintiff was required to post bonds in the amount of 27.42% of the value of the merchandise entered.

and before June 22, 1984, the Court finds Rheem asserted countervailing duties at the rate established by Commerce's final determination in the *Certain Carbon Steel Products from Brazil* countervailing duty investigation.[10] Accordingly, those entries became liquidated by operation of law with countervailing duties due in the amount of 36.48% *ad valorem*, 62.18% *ad valorem*, and 17.49% *ad valorem* for merchandise manufactured by COSIPA, CSN and USIMINAS, respectively. As for the merchandise plaintiff asserted was manufactured by Rheem in the SSSI forms accompanying those entries, those goods were liquidated by operation of law with countervailing duties due at the rate which Customs required plaintiff to post a bond in order to enter that merchandise. Customs will reliquidate the goods to the extent necessary to be in compliance with the Court's findings.

(Slip Op. 96–197)

MAGNESIUM CORP. OF AMERICA, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND JSC AVISMA TITANIUM-MAGNESIUM WORKS, ET AL. DEFENDANT-INTERVENORS

Court No. 95–06–00789

[Commerce's remand determination affirmed.]

(Decided December 23, 1996)

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Margaret R. Polito, George W. Thompson (Neville, Peterson & Williams), counsel for defendant-intervenor Hunter Douglas Metals.

Frederick P. Waite, Denise Cheung (Popham, Haik, Schnobrich & Kaufman, Ltd.), counsel for defendant-intervenors Gerald Metals, Inc., Greenwich Metals, Inc., and Hochschild Partners.

OPINION

POGUE, *Judge:* This matter is before the court following a remand determination. The remand was ordered on August 27, 1996 to allow Com-

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[10] Commerce's final determination in the *Certain Carbon Steel Products from Brazil* investigation established countervailing duty rates of 36.48% *ad valorem*, 62.18% *ad valorem*, and 17.49% *ad valorem* for merchandise manufactured by COSIPA, CSN and USIMINAS, respectively. These rates were the countervailing duty rates applicable to the last four entries *at their time of entry into the United States*. Before Customs accepted plaintiff's entry summary documentation as filed in proper form, plaintiff was required to post bonds calculated at the relevant percentage of the imported merchandise's value, depending on which manufacturer was responsible for producing the goods.

merce to recalculate the surrogate value for the Russian producers' selling, general and administrative expenses ("SG&A") and to consider whether the export taxes paid by a nonmarket economy (NME) producer should be deducted from United States price. *See Magnesium Corp. of America v. United States*, 938 F.Supp. 885 (1996). Familiarity with that decision is presumed.

DISCUSSION

1. *Valuation of SG&A Expenses:*

In its Final Determination, Commerce calculated a surrogate value for the Russian producers' SG&A using the general expenses line item of a Brazilian silicomanganese producer's submission from an earlier antidumping investigation. Remand Determination at 1. In that calculation, Commerce failed to include general selling expenses. That omission has been corrected on remand.

Defendant-Intervenors initially object to the remand determination, claiming that there is better information available on the record—data from two Brazilian aluminum producers—which should be utilized rather than the data Commerce used to correct the earlier omission. Defendant-Intervenors claim that Commerce selected Brazil as a surrogate country because "Brazil is a significant producer of the product most comparable to magnesium, aluminum." (Def.-Int.'s Cmts. at 3.) Defendant-Intervenors therefore contend that their aluminum data, rather than the silicomanganese data, is "the most appropriate surrogate data." *Id.*

In response, Commerce argues that "The respondents did not bring challenge to our use of the public SG&A data from the Silicomanganese from Brazil case" and that respondents' proposal was outside the scope of the remand. The respondents, however, did in fact argue during the administrative proceeding that Commerce should use their data to calculate SG&A for the Russian producers. *See* 60 Fed. Reg. 16,440, at 16,447. Respondents also argued in the litigation prior to the remand decision, that if the Court agreed with plaintiffs, and concluded that Commerce's calculation of SG&A expenses was unsupported by substantial evidence or otherwise not in accordance with law, Commerce should use the data supplied by respondents as the best alternative. *See Magnesium*, 938 F.Supp. 885, 898.

In remanding this issue, the Court directed Commerce to recalculate the surrogate value for Russian producers' SG&A expenses "because Commerce has admitted that its valuation is not supported by substantial evidence on the record." *Id.* The Court did not specify how Commerce should recalculate the SG&A expenses. Therefore, respondents' proposed basis for the SG&A expenses is not outside the scope of the remand.

Nowhere in the record did Commerce explain its decision to use the silicomanganese data rather than the respondents' aluminum data. For the reviewing court to ascertain whether an agency acted arbitrarily, it is necessary that the administrative agency cite the reasons for its deci-

sion on the record. *See Nachi-Fujikoshi Corp. v. United States*, 16 CIT 606, 609, 798 F.Supp. 716, 719 (1992). However, in their reply, defendant-intervenors' abandon this claim as "not significant enough to contest." p.2 (Def-Int.'s Reply to Pl.'s Cmts. on Rem. Deter.) Consequently, the Court cannot address the issue further.

2. *Export Taxes:*

In its Final Determination, Commerce did not deduct export taxes paid by the Russian producers to the Russian government. Final Determination, 60 Fed. Reg. at 16,442. Upon remand, Commerce concluded that, in the context of a nonmarket economy, Commerce cannot presume that "a producer subject to a government-imposed export tax can be expected to actually incur the tax liability and to incorporate the tax amount into its cost and pricing structure." Remand Determination at 6.

Plaintiff argues that the export tax provision of the statute is mandatory, and that Commerce is required to reduce United States price by "the amount, if included in such price, of any export tax * * * imposed by the country of exportation on the exportation of the merchandise to the United States." 19 U.S.C. § 1677a(d)(2)(B)(1988). (Pl.'s Cmts. at 8).

In its remand determination, Commerce states that the requirement that export taxes be subtracted from United States price is not absolute. The statute requires the subtraction of the export taxes only if they are paid on exports to the United States and included in the export price of the merchandise under investigation. When dealing with export taxes in a nonmarket economy, Commerce argues that widespread governmental intervention and influence in NME enterprises prevent the Department from "determining whether and to what extent a tax might be reflected in a price." Remand Determination at 6.

Plaintiffs claim that the record establishes that the Russian Government imposes the export tax and that the Russian producers reported that the tax was paid. (Pl.'s Cmts. at 7.) Plaintiffs note that Commerce "routinely presumes that certain expenses that are incurred within an NME are included in the price charged by NME exporters." *Id.* at 8.

Despite plaintiffs' claim, the statute does not specify how Commerce is to determine whether an export tax is included in United States price for goods produced in a nonmarket economy. The treatment of market and nonmarket economies differs significantly under the statute. *See* 19 U.S.C. § 1677b(c)(1988)(provision for calculating foreign market value in nonmarket economy); *see also Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442 (Fed. Cir. 1994). *See generally* Carbon Steel Wire Rod from Czechoslovakia, 49 F.R. 19370 (Dep't Comm. 1984)(final neg. countervail. duty determ.)(discussing differences between market and nonmarket economies).

In a nonmarket economy, the possibility of governmental intervention and influence over enterprises and industries precludes Commerce from presuming that the export tax is actually reflected in the price of the merchandise. Moreover, there is no market to determine price. In

such a situation, the Court cannot second-guess Commerce's reasonable interpretation of the statute that the requirements for an export tax adjustment on the U.S. price side of the equation are not fulfilled in a nonmarket economy; thus the Court must defer to Commerce's interpretation. *See Daewoo Electronics Co., Ltd. v. Int'l Union of Electronic Elec., Technical, Salaried and Mach. Workers*, 6 F.3d 1511, 1516 (Fed. Cir. 1993); *see also Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1039 (1996).

Accordingly, the remand results are sustained.

(Slip Op. 96–198)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 92–07–00505

(Dated December 26, 1996)

JUDGMENT

TSOUCALAS, *Senior Judge:* On October 17, 1996, pursuant to a decision and mandate of the United States Court of Appeals for the Federal Circuit, this Court remanded one issue arising from the above-captioned case to the Department of Commerce, International Trade Administration ("Commerce"). Specifically, the Court ordered Commerce to either include or exclude the doubtful debt reserve accounts in the calculations of both home market expenses and United States indirect selling expenses for Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo") in the administrative review, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360 (1992).

In accordance with the remand order, Commerce filed its *Final Results of Redetermination Pursuant to Court Remand, Slip Op. 96–168 (Oct. 17, 1996) ("Remand Results")*, in which Commerce decided to exclude Koyo's doubtful debt from the computations of both its United States and home market indirect selling expenses. Commerce, having complied with this Court's order, it is hereby

ORDERED that the Remand Results are affirmed, and it is further

ORDERED that all other issues having been decided, this case is dismissed.

(Slip Op. 96–199)

FAG KUGELFISCHER GEORG SCHAFER KGaA, FAG ITALIA S.p.A, FAG (U.K.) LTD., BARDEN CORP. (U.K.) LTD., FAG BEARINGS CORP, AND BARDEN CORP, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP., TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 93–08–00493

(Dated December 26, 1996)

JUDGMENT

TSOUCALAS, *Senior Judge:* On July 10, 1996, this Court remanded to the Department of Commerce, International Trade Administration ("Commerce"), three issues arising from the administrative review, entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order*, 58 Fed. Reg. 39,729 (1993).

Pursuant to the remand, Commerce filed its *Final Results of Redetermination Pursuant to Court Remand, Slip Op. 96–108 (July 10, 1996) ("Remand Results").* In accordance with the Court's remand order, Commerce did the following in the Remand Results: (1) recalculated constructed value for FAG Italia S.p.A. without applying best information available to the actual cost of related-party inputs; (2) calculated separate dumping margins for FAG (U.K.) Limited and Barden Corporation (U.K.) Limited; and (3) corrected the error in the Statistical Analysis Software program. Commerce having complied with the Court's order, it is hereby

ORDERED that the Remand Results are affirmed, and it is further

ORDERED that all other issues having been decided, this case is dismissed.

(Slip Op. 96–200)

CRESCENT FOUNDRY CO. PVT. LTD., NANDIKESHWARI PVT. LTD., CARNATION ENTERPRISES PVT. LTD., KAJARIA IRON CASTINGS PVT. LTD., KEJRIWAL IRON & STEEL WORKS, OVERSEAS IRON FOUNDRY PVT. LTD., RAGHUNATH PRASAD PHOOLCHAND LTD., R.B. AGARWALLA & CO., RSI INDIA PVT. LTD., SERAMPORE INDUSTRIES PVT. LTD., SITARAM MADHOGARHIA & SONS PVT. LTD., SUPER CASTINGS (INDIA), TIRUPATI INTERNATIONAL (P) LTD., AND UMA IRON & STEEL CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ALHAMBRA FOUNDRY INC., ALLEGHENY FOUNDRY CO., DEETER FOUNDRY INC., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY INC., MUNICIPAL CASTINGS, INC., NEENAH FOUNDRY CO., U.S. FOUNDRY & MANUFACTURING CO., AND VULCAN FOUNDRY, DEFENDANT-INTERVENORS

Court No. 95–09–01239

[ITA determination sustained in part and remanded in part.]

(Dated December 26, 1996)

Cameron & Hornbostel (Dennis James, Jr.) for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis)* and *Robert E. Nielsen*, Senior Counsel, Office of Chief Counsel for Import Administration, Department of Commerce, of counsel, for defendant.

Collier, Shannon, Rill & Scott (*Paul C. Rosenthal* and *Robin H. Gilbert*) for defendant-intervenors.

MEMORANDUM OPINION AND ORDER

DICARLO, *Senior Judge:* This action arises from the 1990 administrative review of a countervailing duty order, first issued by the Department of Commerce in 1980, concerning certain iron metal castings from India exported to the United States, including manhole covers and frames, clean-out covers and frames, and catch basin grates and frames. *Certain Iron Metal Castings from India*, 60 Fed. Reg. 44,849 (Dep't Comm. 1995) (final admin. review) [hereinafter *Final Determination]; see Certain Iron Metal Castings from India*, 45 Fed. Reg. 68,650 (Dep't Comm. 1980) (original countervailing duty order). The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(i) (1994) and 28 U.S.C. § 1581(c) (1994).

BACKGROUND

At the conclusion of the 1990 administrative review, Commerce amended the countervailing duty rates assigned to the fourteen Indian companies that exported the subject merchandise to the United States in 1990. *Final Determination* at 44,855. The following issues raised during that review are presently in dispute:

(1) Commerce determined that certain payments under the Indian government's Cash Compensatory Support (CCS) program were countervailable. The CCS program rebates indirect taxes and import duties borne by inputs physically incorporated into an exported product. While

generally such rebates are not countervailable, Commerce found that some CCS payments made to plaintiff exporters refunded charges for services, not indirect taxes. *Certain Iron Metal Castings from India*, 60 Fed. Reg. 4,592, 4,594 (Dep't Comm. 1995) (prelim. admin. review) [hereinafter *Prelim. Determination*]. These included fees for wharfage, berthage, pilotage, and towage assessed at the Port of Calcutta. *Final Determination* at 44,852. Based on this re-classification, Commerce determined that plaintiffs received an over-rebate in 1990 in the amount of the refunded service charges, resulting in a countervailable subsidy of 4.24% *ad valorem*. (Pls.' Mem. of Points & Authorities in Support of Pls.' R. 56.2 Mot. for J. on Agency R. App. at A–35 (*Country-Wide Rate Calculation*, Nonpub. Doc. No. 27);) *Prelim. Determination* at 4,594. Plaintiffs argue that Commerce should have treated certain of those fees as indirect taxes, rebates of which are noncountervailable.

(2) Commerce assigned eleven companies a common countervailing duty rate of 10.16% *ad valorem* based on the country-wide average benefit received, but assigned "significantly different," company-specific rates to the three remaining investigated companies pursuant to 19 C.F.R. § 355.22(d)(3): Overseas Steel at 18.52%, Sitaram Steel at 22.32%, and Nandikeshwari at 4.29%. *Final Determination* at 44,855; *see Administrative Review of Orders and Suspension Agreements*, 19 C.F.R. § 355.22(d)(3) (1994). To calculate the country-wide 10.16% figure, Commerce weight-averaged the subsidy rates of all fourteen investigated companies, including the three companies with "significantly different" rates. *Prelim. Determination* at 4,592; *Final Determination* at 44,855. Plaintiffs contend that the two companies with significantly higher subsidy rates should not have been included in the country-wide average.

(3) Section 80HHC of the Indian tax code permits exporters to deduct profits derived from the export of goods and merchandise from their taxable income. *Prelim. Determination* at 4,594. Commerce found that this § 80HHC program was a countervailable subsidy, calculated as the difference between the tax paid and the tax that would have been paid absent the deduction taken, or 2.59% *ad valorem* for all but three companies. *Id.*; (Pls.' Br. App. at A–35 (*Country-Wide Rate Calculation*, Nonpub. Doc. No. 27)). Part of the § 80HHC deduction taken was attributable to CCS payments, some of which Commerce classified as over-rebates. *Final Determination* at 44,854. Plaintiffs argue that Commerce should have excluded that part of the deduction from its calculation of the § 80HHC subsidy.

(4) Payments received under the Indian government's International Price Reimbursement Scheme (IPRS), which reimbursed exporters for the difference in price between higher-priced domestic pig iron and its foreign equivalent, were also deductible under § 80HHC. *Id.* Commerce found that none of the plaintiffs had received IPRS payments attributable to the subject merchandise in 1990. *Prelim. Determination* at 4,595.

Plaintiffs argue that Commerce acted *ultra vires* when it included that part of the deduction in its calculation of the § 80HHC subsidy.

DISCUSSION

Once Commerce makes a final determination in a countervailing duty investigation, the court must uphold that determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

I

According to the GATT *Illustrative List of Export Subsidies*, a countervailable benefit exists when the remission of prior stage cumulative indirect taxes and import duties on goods or services used in the production of exports exceeds the remission of like taxes on like products sold domestically. *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Relating to Subsidies and Countervailing Measures)*, Apr. 12, 1979, Annex items (h-i), 31 U.S.T. 513, 546–47 [hereinafter *Illustrative List*]. There is an exception, however, for taxes levied on goods that are physically incorporated into the exported product. Remission of those taxes is not countervailable. *Id.* item (h).

19 U.S.C. §§ 2502(1), 2503(c)(5) (1988) have incorporated the *Illustrative List* into United States domestic law. *Creswell Trading Co. v. United States*, 15 F.3d 1054, 1057 n.4 (Fed. Cir. 1994); *Creswell Trading Co. v. United States*, 20 CIT ____, 936 F. Supp. 1072, 1075 (1996). Commerce implements countervailing duty law according to its regulations in 19 C.F.R. §§ 355.1–355.51 (1994). Commerce has proposed a set of additional regulations codifying its already existing practice with respect to the identification and measurement of subsidies. *Notice of Proposed Rulemaking and Request for Public Comments: Countervailing Duties*, 54 Fed. Reg. 23,366 (1989) (to be codified at §§ 355.41–355.51) [hereinafter *Proposed Rules*]. The proposed regulations state that "the nonexcessive * * * remission * * * of prior stage cumulative indirect taxes or import charges levied on goods that are physically incorporated * * * in the exported product shall not confer a countervailable benefit." *Id.* at 23,382; *see also id.* at 23,373 (summarizing proposed regulation). Commerce will not countervail a rebate if it finds that "(1) the [rebate] program operates for the purpose of rebating prior stage cumulative indirect taxes and/or import charges; (2) the [foreign] government accurately ascertained the level of the rebate; and (3) the government reexamines its schedules periodically to reflect the amount of actual indirect taxes and/or import charges paid." *Prelim. Determination* at 4,594; *Proposed Rules* at 23,382.

Even if the tax rebate program meets this general threshold requirement, Commerce will then examine whether there was an over-rebate in the specific period under review. There is an over-rebate if exporters receive a rebate greater than the amount actually paid in indirect taxes and import duties on inputs physically incorporated into the subject merchandise. If so, the excess is a countervailable benefit. *Prelim. Determination* at 4,594; *Proposed Rules* at 23,373.

Through the CCS program, the government of India provides a cumulative tax rebate, payable on export, for certain taxes incurred in the production of a finished good. *Prelim. Determination* at 4,594. In prior administrative reviews, Commerce determined that the CCS program rebated prior stage cumulative indirect taxes and import charges, and that the government of India periodically reexamined its schedules and maintained an accurate rebate level. *Prelim. Determination* at 4,594; *see, e.g., Certain Iron Metal Castings from India*, 56 Fed. Reg. 41,650, 41,653 (Dep't Comm. 1991) (1989 prelim. admin. review). Because the program met the three conditions outlined above, Commerce had not countervailed CCS rebate payments in the past. *Prelim. Determination* at 4,594.

During the 1990 review period, Indian manufacturers moved from domestic to imported pig iron as the basic raw material used in the production of exported castings. *Id.* Exporters received CCS rebate payments for government fees related to the imported pig iron. Commerce found that some of those fees were charges for services rendered. *Id.* Services cannot be physically incorporated into a product. Consequently, rebates of service charges do not fall under the exception in item (h) of the *Illustrative List*. CCS payments rebating service charges are therefore countervailable over-rebates. *Id.*

Plaintiffs argue that Commerce miscalculated the CCS over-rebate by treating port dues and wharfage fees as service charges, claiming that they are more properly classified as noncountervailable rebates of indirect taxes. (Pls.' Br. at 21–22.) The port dues are a 3.5 rupee per net registered vessel ton charge levied by the Calcutta Port Trust, part of the Government of India, on all ships entering the Port of Calcutta. *Cash Compensatory Support (CCS) Program*, Pub. Doc. No. 68 attach. A (May 26, 1994) (included in Pls.' Br. App. at A–36, A–38). The wharfage fee is a 70 rupee per ton charge for loading and unloading goods. It is discounted twenty-five percent if the loading is done by the importer's own labor and equipment. *Id.*

Commerce provided both the investigated companies and the Government of India with an opportunity to demonstrate that the port dues and wharfage fees were indirect taxes as described in items (h) and (i) of the *Illustrative List*. Their responses relied principally on a statement by the Government of India that the fees were "tantamount to taxes" because they were paid to the Calcutta Port Trust, a division of the Indian government. *Cash Compensatory Support (CCS) Program*, Pub. Doc. No. 68 at 2 (May 26, 1994) (included in Pls.' Br. App. at A–36, A–37); *Fi-*

nal Determination at 44,852. This is not adequate in itself to demonstrate that the fees were taxes rather than service charges. Governments collect both forms of revenue, and the label assigned to a particular fee does not definitively indicate its nature. *See United States Shoe Corp. v. United States*, 19 CIT ___, ___, 907 F. Supp. 408, 411 (1995) (citing *Fairbank v. United States*, 181 U.S. 283, 304 (1901)).

Plaintiffs contend that all of the port dues and 75% of the wharfage tax are "in the nature of taxes" because they are not tied to the provision of any service. *Final Determination* at 44,852. The evidence in the record does not support that claim. The wharfage fee is tied to a service: the loading and unloading of goods. It is true that importers pay 75% of the fee even if they supply their own labor and equipment. However, even assuming that the real cost of wharfage is only 25% of the wharfage fee, a service charge does not become a tax merely because it does not accurately reflect the actual cost of providing the service. The port dues are also service-related. They are charges assessed on users of a developed facility, an improved navigable port requiring ongoing maintenance. As plaintiffs provided no evidence to the contrary, Commerce reasonably concluded that the port dues were tied to the provision of a navigable harbor.

Plaintiffs conceded that a number of other expenses reimbursed through the CCS program were service charges. (Pls.' Reply to Def.'s & Def.–Intervenors' Opp'n at 20 (referring to pilotage and towage charges).) When plaintiffs did not put enough information in the record to support a conclusion that the port dues and wharfage fees differed in nature from those expenses, Commerce was justified in concluding that they too were service charges, rebates of which are countervailable. *See Industrial Fasteners Group, American Importers Ass'n v. United States*, 710 F.2d 1576, 1582 & n.10 (Fed. Cir. 1983) (in the absence of information making at least a prima facie case that CCS payments were non-countervailable, Commerce properly imposed a countervailing duty). The court finds that Commerce's determination that an over-rebate existed is supported by substantial evidence and is in accordance with law.

II

At the time of the administrative review, the statute governing countervailing duty determinations for countries that were signatories of the GATT Subsidies Code provided that

> If—
>
> (1) the administering authority determines that—
>
> (A) a country under the Agreement * * *
>
> is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported * * * into the United States, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured * * *
>
> by reason of imports of that merchandise * * *,

> then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, *equal to the amount of the net subsidy.*

19 U.S.C. § 1671(a) (1988) (emphasis added). Neither the statute nor the applicable regulations specifically defined how that "net subsidy" should be calculated. *Ipsco Inc. v. United States*, 899 F.2d 1192, 1195 (Fed. Cir. 1990); *see* 19 U.S.C. §§ 1671–1671h (1988); 19 C.F.R. §§ 355.1–355.51 (1994).

In determining the net subsidy for iron castings, Commerce first calculated a subsidy rate for each company subject to review, then weight-averaged the rates according to each company's share of the total subject Indian exports to the United States. *Final Determination* at 44,850. In accordance with its regulations, Commerce then assigned a separate countervailing duty rate to companies whose individual rates differed significantly from the country-wide weighted average. *Id.*; *see Administrative Review of Orders and Suspension Agreements*, 19 C.F.R. § 355.22 (1994). A "significant differential" is defined in relevant part as "[a] difference of the greater of at least five percentage points, or 25 percent, from the weighted-average net subsidy calculated on a country-wide basis." 19 C.F.R. § 355.22(d)(3)(i) (1994). The companies assigned individual rates were treated separately for countervailing duty and cash deposit assessment purposes, but their "significantly different" individual rates were included in the calculation of the weighted average, causing the country-wide rate assigned to the majority to be higher than it would otherwise have been. *Final Determination* at 44,855.

Plaintiffs argue that by including firms that received significantly higher subsidies in its calculation, while also applying the high rates separately to individual exporters, Commerce inflated the resulting country-wide average rate and double-counted the higher subsidies. (Pls.' Br. at 13–15.) The argument is similar to that raised in *Ceramica Regiomontana, S.A. v. United States*, 18 CIT 376, 386, 853 F. Supp. 431, 439 (1994), *rev'd on other grounds*, 64 F.3d 1579 (Fed. Cir. 1995), in which Commerce argued that including firms with *de minimis* subsidies in the country-wide average would dilute the average rate. That argument was rejected as "meritorious, but nonetheless conflict[ing] with binding precedent" set forth in *Ipsco Inc. v. United States*, 899 F.2d 1192 (Fed. Cir. 1990). *Ceramica Regiomontana*, 18 CIT at 387, 853 F. Supp. at 439. *Ipsco* governs here as well.

In *Ipsco*, an investigation of Canadian oil country tubular goods revealed that nine of eleven investigated firms received subsidies below the *de minimis* level. Commerce found that the country-wide rate applicable to the two remaining firms was the rate found for Ipsco, the only significantly subsidized firm that responded to Commerce's inquiries. In doing so, Commerce excluded the *de minimis* rates of the remaining nine firms from its calculation. *Ipsco*, 899 F.2d at 1193–94. The court held that Commerce's methodology was unreasonable because it did not produce a country-wide countervailing duty rate that bore "some rela-

tion to the approximate average rate of subsidization of the subject goods." *Id.* at 1197. The court concluded that country-wide countervailing duty rates must reflect the subsidies received by all firms that produce or export the goods, even those that receive significantly lower benefits. *Id.*; *Ceramica Regiomontana*, 18 CIT at 387, 853 F. Supp. at 439.

The purpose of countervailing duty law is to neutralize government-sponsored subsidization on a country-wide basis. To that end, at the time of the 1990 administrative review, Congress had established a presumption in favor of country-wide countervailing duty rates. 19 U.S.C. § 1671e(a) (1988) ("[T]he administrating authority shall publish a countervailing duty order which * * * shall presumptively apply to all merchandise of such class or kind exported from the country investigated[.]"). Significantly different rates were exceptions to this general rule, recognizable as "significantly different" only when compared to a "weighted-average net subsidy calculated on a country-wide basis[,]" or to a net subsidy of zero (or *de minimis*)[.]" 19 C.F.R. § 355.22(d)(3) (1994); *see* 19 U.S.C. § 1671e(a)(2) (1988) ("except that if * * * there is a significant differential between companies receiving subsidy benefits * * * the order may provide for differing countervailing duties"). It would be inconsistent with the concept of a country-wide rate to exclude companies receiving a significantly different benefit, whether higher or lower, when determining the amount of the weighted-average net subsidy. *See Ipsco*, 899 F.2d at 1197.

Plaintiffs are correct that including the highest subsidy rates in a country-wide average applied to firms receiving smaller subsidies, while also applying the high rates separately to individual exporters, results in a higher duty than applying individual rates to each company or using the same average rate for every firm. This "double-counting" is a consequence of the then-existing statutory exception for significantly different rates. It will not occur in investigations initiated after January 1, 1995 because Congress has revised the countervailing duty law, directing Commerce to use either a country-wide average or individual rates, but not both. 19 U.S.C. §§ 1671b(d), 1671d(c)(5) (1994); (*see* Pls.' Reply at 12 n.10; Def.'s Mem. in Opp'n to Pls.' R. 56 Mot. for J. upon Agency R. at 11 n.13.) The general rule now favors individual countervailing duty rates for each investigated company. *Uruguay Round Agreements Act: Statement of Administrative Action*, *reprinted in* H.R. Doc. 103–316 (1994) at 656, 941–42. In instances where the number of exporters or producers is too large for individual rates to be practical, Commerce may continue to use a single country-wide rate, calculated "on the basis of aggregate data," but there is no longer an exception for firms with significantly different rates. *Id.* at 941; *see* 19 U.S.C. § 1671d(c)(5) (1994). Where Commerce uses the country-wide method, there will be no issue of double-counting because all firms will receive the same weighted-average rate, calculated "based on industry-wide data regarding the use of

subsidies determined to be countervailable." 19 U.S.C. § 1671d(c)(5)(B) (1994).

The court finds that Commerce's methodology was reasonable and in accordance with the law as it then stood. Commerce correctly determined that under *Ceramica Regiomontana* and *Ipsco* it was required to include all companies receiving a significantly different benefit, whether higher or lower, in its calculation of the country-wide rate applied to the subject merchandise.

III

Section 80HHC of the Indian tax code permits exporters to deduct profits derived from the export of goods and merchandise from taxable income. Commerce found that § 80HHC was countervailable "because receipt of benefits * * * is contingent on export performance." *Prelim. Determination* at 4,594 (citing *Certain Iron Metal Castings from India*, 56 Fed. Reg. 52,521 (Dep't Comm. 1991) (1989 final admin. review)). All but one company indicated that its entire taxable income was export-related, and claimed a § 80HHC deduction for the full amount. (Pls.' Br. at 23–25; *see, e.g.*, Pls.' Br. App. at 31–34 (RSI India Pvt. Ltd. 1990 tax return).) Commerce therefore used the entire deduction to determine the subsidy received under the program, calculated as the difference between the tax paid and the tax that would have been paid absent the deduction. *Prelim. Determination* at 4,594; *Final Determination* at 44,854.

Under the Indian tax system, rebates received under the CCS program are included in taxable income. (*See, e.g.*, Pls.' Br. App. at 31–34 (RSI India Pvt. Ltd. 1990 tax return).) While generally CCS rebates are not countervailable, Commerce determined that certain CCS payments in 1990 were actually countervailable rebates of service charges. *See* discussion *supra* pt. I. Part of the § 80HHC subsidy therefore consisted of the value of CCS over-rebates, which were already subject to a countervailing duty. It is that part of the subsidy that plaintiffs dispute.

Defendant argues that since CCS payments are merely reimbursement for previous expenses, they cannot result in a profit. They therefore do not constitute a part of the profit figure exempted from taxation, and are not double-counted when that exemption is countervailed. (Def.'s Br. at 41–42.) The argument is without merit. Section 80HHC exempts a company's entire export-related profit from taxation. This bottom-line figure reflects the sum total of revenues and expenses for the year. CCS payments necessarily affect that bottom line; a company that incurs expenses without reimbursement will have a lower profit margin than if it had been reimbursed. They therefore constitute a part of any profit figure exempted from taxation under § 80HHC.

Plaintiffs agree that the portion of the § 80HHC deduction attributable to CCS payments reimbursing *indirect taxes* is a countervailable subsidy. They concede that "if the CCS paid * * * had not been found to be a direct subsidy, then exempting it from taxation, which is the ultimate effect of 80HHC, would, of course, be a separate subsidy." (Pls.' Re-

ply at 29.) However, plaintiffs claim that Commerce should not have countervailed the portion of the § 80HHC subsidy attributable to CCS payments classified as *over-rebates*. They argue that "countervailing a tax deduction while at the same time also countervailing revenues that make up that deduction double counts the subsidy[,]" (Pls.' Br. at 28), and that therefore Commerce countervailed more than the actual benefit received, in violation of 19 U.S.C. § 1671(a) (1988).

Plaintiffs' argument mirrors Commerce's reasoning in an earlier determination, *Carbon Steel Wire Rod from Argentina*, 47 Fed. Reg. 42,393 (Dep't Comm. 1982) (suspension of investigation) [hereinafter *Argentine Wire Rod*], in which Commerce declined to countervail an income tax exemption for an indirect tax rebate scheme that paralleled India's CCS program. As in this case, Commerce had determined that while Argentina's *reembolso* rebate scheme was generally noncountervailable, some payments were excessive over-rebates and could be countervailed. In the course of that investigation, petitioners argued that "exemption of *reembolso* payments from the income tax constitutes an additional bounty or grant that is countervailable." *Id.* at 42,395. Commerce replied that "the *whole* of a non-excessive rebate of indirect taxes—including any secondary tax effects—is non-countervailable[.]" *Id.* This is contrary to plaintiffs' concession above that § 80HHC deductions allowed for nonexcessive CCS payments are a countervailable subsidy. Regarding over-rebates, Commerce stated that:

> With respect to that portion of the *reembolso* determined to confer a bounty or grant * * * we conclude that there is no additional benefit attributable to the income tax exemption. Since we have separately determined the full benefit from the over-rebate, we would be double-counting if we were to consider that a countervailable benefit is conferred by its exemption from the income tax. Further, the Department consistently has taken the position that it will not examine the income tax consequences of non-income tax subsidy programs. Whether and to what extent each producer's or exporter's benefits from a program unrelated to income taxes would be increased or diminished as a consequence of application of its country's income tax laws is a difficult and complex matter which is neither feasible nor necessary to explore.

Id. Commerce reaffirmed its reasoning in a second investigation involving the *reembolso* in 1988. *Certain Welded Carbon Steel Pipe and Tube Products from Argentina*, 53 Fed. Reg. 37,619, 37,626 (Dep't Comm. 1988) (final aff. determination) [hereinafter *Argentine Pipe and Tube].* Thus, in the two instances in which Commerce has addressed the countervailability of a tax exemption for rebates of indirect taxes, it has adopted an interpretation contradictory to its position here.

No investigation since *Argentine Wire Rod* has addressed this double-counting issue. Only one investigation since *Argentine Pipe and Tube* has involved a tax-exempt countervailable subsidy. In *Certain Steel Products from Belgium*, 58 Fed. Reg. 37,273 (Dep't Comm. 1993) (final aff. determination) [hereinafter *Belgian Steel*], certain companies re-

ceived countervailable cash grants for expanding enterprises within designated development zones. *Id.* at 37,275. The grants were also exempt from corporate income tax. Commerce found the exemption to be countervailable, despite the fact that the grants themselves had already been countervailed. However, because Commerce found that all investigated companies received a benefit of 0.00 percent from the tax exemption, the issue of double-counting did not arise. *Id.* at 37,283.

Commerce has not stated in the record whether it considered and rejected its prior reasoning in *Argentine Wire Rod* and *Argentine Pipe and Tube* in the course of the investigation at issue here. The explanation for its decision not to subtract CCS over-rebates from the § 80HHC subsidy is somewhat cryptic. *See Final Determination* at 44,854–55. It is clear that tax exemptions based on export performance, such as § 80HHC, are generally countervailable. *Illustrative List* item (e) (Countervailable subsidies include "[t]he full or partial exemption * * * specifically related to exports, of direct taxes * * * paid or payable by industrial or commercial enterprises."); *see, e.g., Certain Pasta ("Pasta") from Turkey*, 61 Fed. Reg. 30,366, 30,370 (Dep't Comm. 1996) (final aff. determination); *Belgian Steel*, 58 Fed. Reg. 37,273; *Extruded Rubber Thread from Malaysia*, 57 Fed. Reg. 38,472 (Dep't Comm. 1992) (final aff. determination). It is also clear that Commerce has a policy of disregarding the secondary income tax consequences of non-income tax subsidy programs. That is, when companies pay higher taxes as a result of receiving a subsidy, Commerce does not subtract the added taxes from the amount of the subsidy when calculating the benefit conferred. *Geneva Steel v. United States*, 20 CIT ____, ____, 914 F. Supp. 563, 609–10 (1996) (sustaining Commerce's refusal to offset countervailable benefits by the taxes paid as a result of receiving subsidy benefits); *Ipsco, Inc. v. United States*, 12 CIT 359, 366–67, 687 F. Supp. 614, 621 (1988). The countervailing duty statute provides an exclusive list of offsets deductible from a gross subsidy to determine the net subsidy, and tax consequences are not included in that list. 19 U.S.C. § 1677(6) (1988); *see also Geneva Steel*, 20 CIT at ____, 914 F. Supp. at 609–10 (list of offsets is narrowly drawn and all-inclusive).

Commerce cited this policy of disregarding secondary tax consequences as the reason for refusing to eliminate countervailed CCS payments from its calculation of the § 80HHC subsidy. *Final Determination* at 44,855. However, the logic of that policy would seem to dictate the opposite result: that when companies pay lower taxes as a result of receiving a subsidy, Commerce should not add the additional tax benefit to the amount of the subsidy when calculating the benefit conferred. That is, it should not countervail the tax exemption for that subsidy. This interpretation would conform with Commerce's reasoning in *Argentine Wire Rod* and *Argentine Pipe and Tube*.

Should Commerce adopt this interpretation, it would not be excessively burdensome to eliminate CCS over-rebates from the § 80HHC subsidy countervailed. Commerce has already obtained each company's

tax return, which lists the company's taxable income and the amount deducted for CCS payments. It has also already determined the over-rebate received by each company. Commerce need only subtract the over-rebate from taxable income and recalculate the tax that each company would have owed absent the modified § 80HHC subsidy. It can do so without any additional investigation.

Commerce is not required to follow its reasoning in *Argentine Wire Rod* if new arguments or facts support a different conclusion. *Hussey Copper, Ltd. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993); *see Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988). It may repudiate its prior reasoning, it may narrow the zone in which that reasoning applies, or it may find that particular facts in this case justify a departure from the general rule. *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). However, "an agency must either conform itself to its prior decisions or explain the reasons for its departure." *Hussey Copper*, 17 CIT at 997, 834 F. Supp. at 418 (quoting *Citrosuco Paulista*, 12 CIT at 1209, 704 F. Supp. at 1088). If Commerce intends to depart from *Argentine Wire Rod*, it must clearly indicate its reasons for doing so, thereby allowing the court to "understand the basis of the agency's action and * * * judge the consistency of that action with the agency's mandate." *Id.* at 998, 834 F. Supp. at 419 (quoting *Atchison*, 412 U.S. at 808); *cf. British Steel PLC v. United States*, 19 CIT ____, ____, 879 F. Supp. 1254, 1298 (1995) ("Commerce must provide a clear statement of the evidence upon which the agency based its methodology[.]").

Commerce has not included such an analysis in the record. Consequently, the court must remand this issue (1) for an explanation of whether *Argentine Wire Rod* continues to reflect current policy and (2) for a reexamination of whether countervailing the portion of the § 80HHC subsidy attributable to CCS over-rebates double-counts the CCS subsidy.

IV

The Indian government's International Price Reimbursement Scheme (IPRS) reimburses exporters for the difference in price between higher-priced domestic pig iron and its foreign equivalent. Under Indian law, revenue received under the IPRS program is also included in taxable income. (*See, e.g.*, Pls.' Br. App. at 31–34 (RSI India Pvt. Ltd. 1990 tax return).) Commerce found that none of the IPRS payments plaintiffs received in 1990 were associated with subject merchandise exported to the United States. *Prelim. Determination* at 4,595. It also rejected petitioners' argument that IPRS payments for other merchandise indirectly benefited exports of the subject castings. *Final Determination* at 44,851–52, 44,853–54 (Comments 3, 7, and 8). Plaintiffs contend that since IPRS payments did not benefit the subject merchandise in 1990, Commerce should not have countervailed the portions of the § 80HHC deductions attributable to those payments. (Pls.' Br. at 28–29.)

Defendant argues that since IPRS payments are merely reimbursement for previous expenses, they cannot result in a profit, and therefore do not constitute a part of the profit figure exempted from taxation under § 80HHC. (Def.'s Br. at 48–54;) *see Final Determination* at 44,854 (rejecting argument when presented by defendant-intervenors). This argument is without merit, for the reasons discussed in the section above.

Commerce's *Final Determination* relied on a different argument: that "adjust[ing] the benefit of the 80HHC tax program to account for * * * IPRS rebates" would be an impermissible offset to a countervailable subsidy. *Final Determination* at 44,854–55. The countervailing duty statute provides an exclusive list of offsets deductible from a gross subsidy to determine the net subsidy received. 19 U.S.C. § 1677(6) (1988). Commerce is correct that this statutory list of offsets is narrowly drawn and all-inclusive. *Geneva Steel*, 20 CIT at ____, 914 F. Supp. at 609–10. The pertinent question, however, is not whether Commerce should permit an offset not included in the list, but whether 1990 IPRS payments should be included in the § 80HHC gross subsidy at all. Because the only subsidies relevant in a review of a countervailing duty order are those tied to merchandise subject to that order, *see Proposed Rules* at 23,374–75 (to be codified at 19 C.F.R. § 355.47(a)), benefits conferred on other merchandise are necessarily excluded from the "gross subsidy" referred to in the statute.

When Commerce specifically finds that a rebate program did not benefit merchandise subject to the countervailing duty order under review, Commerce cannot then countervail any of the benefit received through that program. "Grants that are tied to production or export of only non-subject merchandise do not provide a countervailable benefit to the subject merchandise." *Final Determination* at 44,854; *Proposed Rules* at 23,374–75 (1989). This includes any beneficial effect on recipients' tax liability. *Cf. Argentine Wire Rod* at 42,395 ("the *whole* of a non-excessive rebate of indirect taxes—including any secondary tax effects—is non-countervailable[.]"). Since the IPRS program did not benefit subject merchandise in 1990, Commerce should not have countervailed the portion of the § 80HHC tax reduction attributable to that program.

Commerce may only exercise its authority to set countervailing duties through a countervailing duty order on specific merchandise. 19 U.S.C. §§ 1671(a), 1671e (1988). Its decision to countervail a tax benefit attributable to a subsidy of nonsubject merchandise exceeded its statutory authority and was not in accordance with law. Accordingly, the court remands this issue for recalculation of the benefit received through § 80HHC after subtracting the value of IPRS payments received from each company's taxable income.

CONCLUSION

For the reasons stated above, Commerce's determination that reimbursement for port dues and wharfage fees constituted a countervail-

able subsidy is sustained. Its methodology for calculating the country-wide rate is also sustained. Commerce's calculation of the § 80HHC subsidy is remanded for recalculation in a manner consistent with parts three and four of this opinion. Remand results are due within forty-five (45) days of the date this opinion is entered. Any party contesting the results shall file comments or responses within thirty (30) days of the remand results, after which Commerce will have fifteen (15) days in which to file a reply.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C96/144 12/24/96 Newman, J.	Crystal Clear Industries	94–05–00292	9801.00.10992 American Goods returned not having been advanced in value or improved in condition	9801.00.10992 Duty free imported merchandise was not advanced in value or improved in condition abroad	Agreed statement of facts	New York Vitamins and other over-the-counter preparations manufactured and produced in the USA

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V96/4 12/16/96 Tsoucalas, J.	Casual Corner, division of U.S. Shoe Corp.	92–03–00200	Transaction value	Refund 16.5%	Agreed statement of facts	New York/Newark Ladies' wearing apparel

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